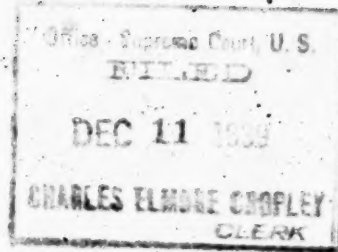


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No. 239

In the Supreme Court of the United States
October Term, 1939

ABE FISCHER, *Petitioner,*

vs.

PAULINE OIL & GAS COMPANY, *Respondent.*

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

Suggestions of Material Facts Omitted from Petitioner's Statement

In order to present properly the theory upon which the respondent has predicated its rights in this case, and also more fully to present the theory upon which the Supreme Court of Oklahoma has based its opinion, we wish to suggest that the transcript of record, although not including testimony to the effect that the Pauline Oil & Gas Company was at all times after January, 1935, when sale was made to it by the assignee for the benefit of creditors of the Geraldine Oil Company, in actual physical possession of the leased property involved herein, it does disclose from the petition of the petitioner, Abe Fischer, filed in the District Court of Pawnee County, Oklahoma, on August 4, 1936, an admission and allegation by the petitioner that this respondent at the

time of the institution of suit was in the actual physical possession of said leased property.

An examination of the transcript of record will further disclose that the petitioner has never alleged or proved any possession by himself or the sheriff making the levy in and to this property.

The insolvency of the Geraldine Oil Company from the time of the assignment for the benefit of creditors and at the time of the levy of execution cannot be and is not disputed.

The transcript of record will show that the petitioner never has alleged or proved any lack of notice to him of the adjudication of bankruptcy, had on October 24, 1935, at the time of his purchase at the sheriff's sale had on November 12, 1935, nor any allegation or proof on his part that he was an innocent purchaser for value, although, as a matter of fact, the original record discloses a stipulation upon the part of the petitioner of having had such notice.

Although the transcript of record does not include the petition of the Pauline Oil & Gas Company to the referee in bankruptcy submitting itself, the property, and the purchase price of \$2500 to the jurisdiction of the referee for the determination of its rights in and to said property, the transcript of record does present the order and judgment of the referee reciting such fact, and adjudicating the validity of the assignment for the benefit of creditors made by the Geraldine Oil Company in October, 1934, and the title acquired therein by the Pauline Oil & Gas Company under sale had in January, 1935.

An itemized statement of this property was also included in the schedule of the Geraldine Oil Company, bankrupt, to its voluntary petition of bankruptcy.

(Petition of Abe Fischer and Exhibits, R. 2-7; Order and Judgment of Referee in Bankruptcy, Exhibit E to Answer, R. 16-17; Schedule to Voluntary Petition in Bankruptcy of Geraldine Oil Company, R. 27-30.)

ARGUMENT

The respondent has called attention to the omissions made in petitioner's statement of the case to bring the Court's attention to the fact that in this case neither the judgment creditor, the sheriff making the levy, nor the petitioner, Abe Fischer, were ever in actual or constructive adverse possession of the property involved, because the same was at all times in the actual physical possession of the respondent. Nor does the petitioner rely upon any alleged solvency of the Geraldine Oil Company at the time of the levy. Nor does the petitioner contend that he was an innocent purchaser for value without notice of the bankruptcy.

Under these circumstances, the instant case can readily be distinguished from the authorities cited by petitioner in his brief wherein the property was held in the actual or constructive possession of an adverse claimant resisting the jurisdiction of the bankruptcy court, or where the party in actual or constructive possession of the property had not consented to and subjected himself and property to the jurisdiction of the bankruptcy court in summary proceedings.

Upon the adjudication of the bankruptcy of the Geraldine Oil Company on October 24, 1935, all rights of creditors to attack the validity of the sale by the assignee for the benefit of creditors to the respondent, Pauline Oil & Gas Company, in January, 1935, vested in the trustee in bankruptcy and in him solely. In other words, the right of Sam Rainbolt, judgment creditor, and those claiming under him, to attack the validity of such sale by the assignee for the benefit of creditors to the respondent vested solely in the trustee.

Even though the referee did not have jurisdiction to require the respondent to submit to summary proceedings to litigate its title and rights to said property, of which it was in possession, the respondent, Pauline Oil & Gas Company, did submit itself and this property to the jurisdiction of the referee in summary proceedings, and in such proceedings the referee adjudicated the rights as between the respondent, Pauline Oil & Gas Company, and the trustee representing all creditors and their rights. The respondent, being in actual physical possession of said property, having submitted itself and the property to the jurisdiction of the referee in such summary proceedings, placed the trustee in constructive possession of the property, and the determination by the referee became final and binding when not appealed from as to all creditors' rights to attack the validity of the title of the respondent, and the validity of the title of the respondent thereby became finally determined.

The Supreme Court of Oklahoma, being convinced of the foregoing, rightly determined that since the respondent's title had been so finally determined valid in such pro-

ceedings, the lien under which the petitioner was claiming was void as against the respondent, who was holding under the trustee through such adjudication, by virtue of Section 67f of the Bankruptcy Act (11 U. S. C. A., Section 107, as amended), since the petitioner was not alleging the solvency of the Geraldine Oil Company or that he was a purchaser for value without notice.

Under the authorities which we will present, however, after such a determination of the rights as between this respondent and all creditors, the petitioner, claiming under a creditor, would be estopped from again litigating in a separate action the title of this respondent or the question as to whether there was any fraud of creditors in the assignment for the benefit of creditors.

Upon adjudication of bankruptcy and the appointment of trustee and assignee for the bankrupt's estate, a right of action, if any, to set aside an alleged fraudulent transfer and assignment for the benefit of creditors vests solely in the trustee and assignee. Nor does failure or refusal of the trustee to bring and prosecute an appropriate action enable the creditor, or those claiming under him, to do so.

In the case of *James S. Trimble vs. Joshua Woodhead et al.*, 102 U. S. 647, 26 L. ed. 290, the syllabus is as follows:

"1. Rights to property fraudulently transferred by a bankrupt, pass to his assignee in bankruptcy, and a creditor of the bankrupt cannot assert them in his own name.

"2. The failure of the assignee to sue within two years does not transfer his right of action to a creditor."

Also, in the case of *Wright et al. v. H. B. Ehrlich & Co.*, (Ga.), 91 S. E. 412, the syllabus by the court is as follows:

“Where one conveys his property to another under circumstances which render the conveyance void, and shortly thereafter is adjudicated a bankrupt, the right to have the property referred to brought to sale as a part of the assets of the bankrupt’s estate is in the trustee in bankruptcy; and individual creditors cannot maintain a suit to have the void conveyance canceled and the property brought to sale to satisfy their demands, without showing that they have moved in bankruptcy court to have the trustee proceed against the property or that he has refused to take steps to subject the property and administer the same as a part of the bankrupt’s estate.

“Applying this ruling to the facts of this case, it was error to refuse to dismiss the plaintiffs’ petition.”

This principle is generally accepted, as evidenced by the note in 11 *Ann. Cases* 932, which is as follows:

“In accord with the reported case it has been very generally held, both under the prior bankruptcy acts and under the Act of 1898, that after the appointment of an assignee or trustee in bankruptcy a creditor cannot maintain a suit to set aside a fraudulent transfer of property by the bankrupt, made prior to the adjudication, but that the right of action is in the assignee or trustee.

United States.—*Glenny v. Langdon*, 98 U. S. 20; *Trimble v. Woodhead*, 102 U. S. 647; *Moyer v. Dewey*, 103 U. S. 301; • • •”

and numerous other authorities are also cited.

We quote from *American Jurisprudence*, Volume 6, page 657, Section 243, together with cases cited in note thereto:

“The trustee’s right to maintain an action to set aside a fraudulent conveyance made by the bankrupt is exclusive; a creditor of the bankrupt cannot maintain such a suit, at least unless he makes the trustee a party thereto. Nor does failure or refusal of the trustee to bring and prosecute an appropriate action enable the creditor to do so. Indeed, a creditor will acquire no right in that behalf, even if no trustee has been appointed. The trustee’s representation of creditors in this respect is not confined to creditors who have liens on the property of the bankrupt, but applies equally to those by simple contract only, whose rights are not different except that until judgment and execution, they are not in a position to assert them.

“*Ruhl-Koblegard Co. v. Gillespie*, 61 W. Va. 584, 56 S. E. 898, 10 L. R. A. (N. S.) 305, 11 Ann. Cas. 929, 22 Am. Bankr. Rep. 643. Annotation: 11 Ann. Cas. 932.

“*Trimble v. Woodhead*, 102 U. S. 647, 26 L. ed 290.”

To the same effect is the case of *Benner v. Scandinavian American Bank*, 73 Wash. 488, 131 Pac. 1149.

Under the foregoing cases and the circumstances as outlined there can be no question that the levy in execution by the sheriff of Pawnee County, which was made within four months from the adjudication in bankruptcy, and under which the petitioner claims title by virtue of sale had after the adjudication, did not place the property involved in the possession of the sheriff. Neither did this levy give any cause of action to Sam Rainbolt, the judgment creditor, or those claiming under him, against the Pauline Oil & Gas Company to set aside the sale made to it by the assignee and

trustee for the benefit of creditors, the title to this cause of action being solely in the assignee and trustee in bankruptcy.

If a claimant in possession of property adverse to the trustee submits himself and property to the jurisdiction of the bankruptcy court in summary proceedings, where otherwise such court would not have jurisdiction, the adjudication in such summary proceedings is final and binding upon the trustee and such claimant.

In the case of *In Re Howard Laundry Co.*, 203 Fed. 445, the third syllabus by the court is as follows:

"Where an issue was raised between a landlord and her tenant's trustee in bankruptcy as to the ownership of certain machinery placed on the rented property by the bankrupt, the landlord was entitled to waive her right to have such issue determined in a plenary suit, and did so by appearing without objections and submitting her right to the master and the court, and was estopped thereafter to claim that the bankruptcy court had no jurisdiction thereof."

We quote from *American Jurisprudence*, Volume 6, page 729, Section 338, as follows:

"Jurisdiction may be conferred on the bankruptcy court by the defendant's consent in cases wherein otherwise it has no jurisdiction, and if adverse claimants in possession of the property, who would otherwise not be within the jurisdiction of the bankruptcy court, nevertheless voluntarily surrender custody of the property or consent to the jurisdiction of the bankruptcy court, then the question of ownership and all other questions in relation thereto, as, for instance, the extent, validity, and priority of liens upon and interests in the property, may be tried out in the bankruptcy proceedings. * * *"

With citations referred to in the note thereto:

“Bankr. Act, Sec. 23b, 11 U. S. C. A., Sec. 46 (b).
See *supra*, Sec. 326.

“*Bryant v. Swofford Bros. Dry Goods Co.*, 214 U. S. 279, 53 L. ed. 997, 29 S. Ct. 614, 22 Am. Bankr. Rep. 111; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 21 S. Ct. 557, 5 Am. Bankr. Rep. 623; *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 S. Ct. 1000, 4 Am. Bankr. Rep. 163.”

CONCLUSION

Under the foregoing authorities, all rights of creditors to attack the validity of sale by the assignee for the benefit of creditors to the respondent, Pauline Oil & Gas Company, vested in the trustee in bankruptcy, and in him solely. The respondent, who was in actual physical possession of the property, submitted itself and this property to the jurisdiction of the referee in summary proceedings. In the hearing on this matter by the referee the issue as to the validity of the title of the respondent and the regularity of the sale had by the assignee and trustee for the benefit of creditors to it was definitely determined by the order of the referee, which was not appealed from by the trustee in bankruptcy, the judgment of the court being as follows (R. 16-17):

“IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Pauline Oil and Gas Company be and it is hereby decreed to be the owner of all oil and gas and the proceeds therefrom produced from said property either in the name of the Geraldine Oil Company, the Pauline Oil and Gas Company, or the Trustee in Bankruptcy, and said oil and gas and the proceeds therefrom which may be impounded or held by the pipeline

company receiving same, are hereby ordered released to the said Pauline Oil and Gas Company, a Corporation."

This judgment of the referee in summary proceedings was an adjudication of the validity of the respondent's title to the property involved herein. Both parties with title to any cause of action in relation thereto consented and submitted to the jurisdiction of summary proceedings, and are estopped from questioning same, even though in the absence of such consent the bankruptcy court would not have had jurisdiction to try such title.

The petitioner has cited authorities to the effect that the nullity of the lien of execution declared by section 67f can only be raised by the trustee in bankruptcy or those claiming under him. We submit that under the foregoing circumstances and authorities the respondent, with a judgment of competent jurisdiction against the trustee in bankruptcy as to the validity of the title in this property and upon a submission of the \$2500 consideration therefor, is in the position of not only claiming under said trustee, but under a judgment as against said trustee and all parties represented by him.

Respectfully submitted,

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